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The Undersea World of Foreign Relations Federalism

Edward T. Swaine*

Long before "Judge Wapner's Animal Court," commercial television broadcast a nature series perhaps equally relevant to the law—"The Undersea World of Jacques Cousteau." The show was popular because of what it revealed about a world still mysterious to many of us. It also appealed, however, because it managed to maintain that air of mystery—the sense of a truly distinct world that could not be wholly disclosed, a sense conveyed even more plainly in the titles of Cousteau's Oscar-winning documentaries, "*Le Monde du Silence*" and "*Le Monde sans Soleil*." This theme undoubtedly owed a great deal to its narrator: more of an explorer, showman, and advocate than scientist, Cousteau had both a keen sense of drama and a healthy instinct for leaving the details to others.

Cousteau's oceans come to mind, improbably enough, in contemplating the Supreme Court's approach to the world of foreign relations federalism. One of the field's attractions is that it looks so different from the rest of the law, partly because there simply isn't much real doctrine to worry about. If we have learned anything from the groundbreaking scholarship of the last five years, it's that the most fiercely held shibboleths—including the orthodox view that the federal government holds a monopoly in external relations, and the complete vulnerability of states to the enforcement of international law in federal courts—have little binding precedent for or against them. The Supreme Court moved first from a period in which few cases seem to have arisen, to one in which it distinguished the world of foreign relations by issuing sweeping paeans to national power, and now to an era in which it says virtually nothing, leaving the little precedent to languish unexplained.

This reticence may have begun thirty years ago, in the wake of Cousteau's own silent world, but has been most evident in the last ten years. In 1994, for example, the Court upheld California's controversial worldwide combined reporting method for

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assessing state corporate franchise taxes on multinationals, dismissing claims that the state policy interfered with the “one voice” America needed to conduct foreign relations—perhaps because of the particulars of congressional deliberation, and perhaps because the Court was rejecting sub silentio any “dormant” constitutional limits on state authority.¹ Last summer, the Court’s eagerly-awaited opinion in *Crosby v National Foreign Trade Council* masterfully imparted as little wisdom as possible: the Court struck down Massachusetts’s Burma procurement law on statutory preemption grounds, avoiding claims that the law violated dormant foreign relations preemption and the dormant Foreign Commerce Clause, and even refusing to explain its approach to questions of statutory preemption in foreign relations cases.²

In the meantime, judges and lawyers with less discretionary dockets must persevere in deciding cases and rendering advice. In a recent case, for example, the US District Court for the Southern District of Florida wrestled with whether it should enjoin a local ordinance restricting Miami-Dade County from doing business with anyone also doing business with Cuba or Cuban nationals. The court confessed that it was difficult to decide given “[a] dearth of established precedent in this evolving area of the law,” and looked forward (in vain, as it turned out) to *Crosby*’s resolution of the matter.³ In the interim, the court guessed that it should enjoin the ordinance, based on a rather extreme theory of constitutional preemption and statutory field preemption. A month later, but again prior to *Crosby*, the US District Court for the Eastern District of California enjoined California’s Holocaust Victim Insurance Relief Act, which required insurance companies doing business in California to disclose European policies issued between 1920 and 1945, on the grounds that the act interfered with the national government’s exclusive authority over foreign relations, violated the dormant Foreign Commerce Clause, and was preempted to boot.⁴ The Ninth Circuit later disagreed on all counts, but did so with little reliance on (and, indeed, in some tension with) *Crosby*. As to the claim that the state legislation interfered with dormant federal authority, the court made an effort to distinguish increasingly remote Supreme Court precedent, but also said it was hesitant to strike down state legislation when the governing case law itself had lain dormant for so long.⁵

Unlike judges and practitioners, we academics are only too happy to explore such murky waters, but like Cousteau, are also too prone to leave them tantalizingly obscure. Even if courts were prepared to resolve the important controversies of foreign relations federalism, our scholarship would be of little genuine assistance.

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1. *Barclays Bank PLC v Franchise Tax Bd*, 512 US 298, 303 (1994).
 2. *Crosby v National Foreign Trade Council*, 530 US 363 (2000).
 3. *Miami Light Project v Miami-Dade County*, 97 F Supp 2d 1174, 1179 (SD Fla 2000).
 4. *Gerling Global Reins Corp v Quackenbush*, 2000 US Dist LEXIS 8815 (ED Cal June 9, 2000).
 5. *Gerling Global Reins Corp v Low*, 240 F3d 739, 753 (9th Cir 2001) (affirming the injunction pending district court’s resolution of an unresolved due process claim).

Recent work has forced us to acknowledge anew that foreign relations federalism involves reconciling conflicting commitments to national authority and state authority. Addressing that problem, however, requires several things we lack: first, a clearer understanding of the surrounding constitutional context; second, a notion of the basic values at stake; third, a means for identifying when those values have been compromised; and fourth, a rational means for resolving those conflicts we are able to identify. Drawing attention to these issues may spur us to think collectively about them, and may suggest strategies for coping with our undersea world.

I. THE UNCERTAIN CONSTITUTIONAL CONTEXT

Most everyone was comfortable supposing that the national government monopolized foreign relations until the Supreme Court actually began applying that notion. *Zschernig v Miller*⁶ held unconstitutional, as applied, an Oregon intestacy statute that imposed conditions discriminating against East Germans. The Court was famously unclear as to the precise basis for its concern—the effect of the state courts’ polemical decisions abroad, their potential for embarrassing the executive branch, or the fact that the state was attempting to conduct foreign relations—and why doing any of those things would be unconstitutional. The decision’s persuasive force was further undermined by its isolation. Not only was the decision one of the few real applications of the monopoly principle, but the Court also failed to come to grips with largely indistinguishable precedent,⁷ and shortly thereafter seemed to abandon *Zschernig* in turn.

Though I think that *Zschernig*’s result was correct, its reasoning has been easy picking for critics of virtually every stripe. Recent revisionist scholarship has offered the most disciplined criticism, one reflecting a more general approach to problems of foreign relations federalism. The first step of such criticism is to delegitimize the decision by stressing its departure from tradition: supportive language in prior cases was dicta, other cases ignored or dismissed similar claims, and the indicted practices both predated the decision and continued unabated. Step two suggests that the doctrine’s temporary hold has been overtaken by changes in the surrounding world, such as the easing of Cold War tensions, mounting skepticism about vesting foreign affairs authority in federal courts, and the diminishing significance of any meaningful division between domestic and foreign affairs. The third and final step is to argue that

6. 389 US 429 (1968).

7. Compare *Clark v Allen*, 331 US 503, 517 (1947) (regarding as “far-fetched” a facial challenge to a California statute having only an “incidental or indirect effect in foreign countries”) with *Zschernig*, 389 US at 435–36, 441 (arguing that, in contrast, the Oregon statute created more than a mere “diplomatic bagatelle” and had “great potential for disruption or embarrassment,” such that it might “well [have] adversely affect[ed] the power of the central government to deal with those problems”).

in this modern world, the political alternatives to judicial supervision obviate any real need for the courts.⁸

Similar stories are told in related areas. One involves the relationship between customary international law and state law: the view that custom is preemptive of federal law arose when state law and old-school custom rarely met; the scope for federal common law rulemaking was in any event restricted by *Erie*, and the nature of custom changed significantly with its application to new subjects like human rights; and Congress or the President should be left to determine when custom has domestic effect.⁹ Another case involves the relationship between the treaty power and constitutional constraints on the exercise of domestic authority. Prior to the Court's decision in *Missouri v. Holland*,¹⁰ it was at least unclear whether the Tenth Amendment restricted the national government's treaty power, and many expected that treaties would be confined to purely international matters; the nationalist view taken in that decision is, in any case, inappropriate given the newly broad view of treaties' domain; and while the Court's reinvigorated concern for federalism prompts revisiting *Holland*,¹¹ the overall diminution of Tenth Amendment constraints means that extending it to the treaty power would not be disabling.¹²

This sort of patterned argument, I should emphasize, marks a disciplined intellectual enterprise, and a refreshing change from the rote recitation of nationalist dicta. The attempt to deprive the orthodoxy of its link to tradition, and to reclaim tradition as a basis for revision, is itself in the finest tradition of political argument.¹³ But the rest of the analysis—the claim of shifts in constitutional context and the constitutional sufficiency of orthodoxy's alternatives—seems vulnerable to the simple objection that we do not know what many relevant parts of the Constitution mean, or how they add up. The variables are considerable. We no longer know, for example, whether there is any real doctrine of dormant foreign relations preemption, or when it applies; whether the dormant Foreign Commerce Clause has broader preemptive effect than the dormant Commerce Clause; what federalism-based limits constrain the exercise of the treaty power, if any; or whether congressional-executive agreements or sole executive agreements are more sharply constrained.

8. See, for example, Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617 (1997).

9. See, for example, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997).

10. 252 US 416 (1920) (upholding a migratory bird protection statute implementing a bilateral treaty against a constitutional challenge based on limits to Congress's domestic lawmaking authority).

11. See, for example, Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 Colum L Rev 1726 (1998); Robert Knowles, Comment, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw U L Rev 735 (2001).

12. Curtis Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390, 459 (1997).

13. See generally J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* ch 7 (Atheneum 1973).

Complaining that attendant legal questions are unresolved or confusing probably seems simpleminded (or, for an academic, even ungrateful, like a dishwasher complaining about messy eaters). The sensible thing to do is to address each such uncertainty carefully and exhaustively. But revisionism sets a higher bar for itself. For one, arguing that the context surrounding a particular doctrine has decisively changed seems to require taking a fairly broad canvas of the legal landscape. Assume, for example, that *Missouri v Holland* came out as it did because the Court was reluctant to transplant the then-substantial limits on Congress's domestic authority, and supposed that the treaty power would not be used on matters of intimate domestic concern. Assume further that both premises were undermined, such that Tenth Amendment restrictions no longer looked so forbidding, and treaties started penetrating the federal *domaine réservé*. We might reasonably conclude, as some suggest, that the Court unwittingly created a nationalist monster. But the Court rendering *Holland* might also (perhaps even simultaneously) be dismayed by the blossoming of state-conducted international relations and their tension with national authority, and it is hard to assess how the Court would perceive the supposed changes in treaty authority without factoring in potential developments in the preemptive scope of dormant authority—particularly if the Court originally contemplated *Zschernig*-type limits more stringent than those observed nowadays.

Constitutional balancing only reinforces the problem. Revisionist scholarship, to its credit, routinely assesses whether the doctrinal changes it commends would seriously upset the balance of constitutional authority. But like nationalists nominally concerned about federalism (who tend to find that state interests are adequately protected through the national political process), foreign relations revisionists dependably suggest that national interests are sufficiently protected by Congress and the President, who can always engage in preemptive lawmaking courtesy of the Supremacy Clause. This seems unduly sanguine about the responsiveness of national political institutions, which in any event behave quite differently than originally imagined by the Framers. It also has the ironic effect of reinforcing *stare decisis*. Concerns that a precedent's premises have been eroded somehow, or that newly recognized principles require bringing dissonant elements into line, are confounded by the suggestion that the constitutional balance is self-correcting; if the courts somehow got it wrong, surely the political branches would have set them straight somehow.

Most importantly, one cannot help but wonder how matters unfold if there is more than one nationalist domino around. Dormant foreign relations preemption may be unnecessary given the availability of preemptive legislation and treaties. But what if the Eleventh Amendment not only prevents a subsequent Congress from imposing damages on states, but also impairs the ability to equitably enforce an extant treaty—as the Supreme Court suggested in *Breard v Greene*?¹⁴ (Or if treaties and

14. 523 US 371, 377 (1998).

implementing legislation are restricted by the anti-commandeering principle and revitalized Commerce Clause limits, or if the presumption against the preemption of state law is much stronger than the presumption favoring preemption in foreign affairs?) Similarly, we may want to refrain from automatically according to customary international law the status of preemptive federal law, given the possibility that it may be expressly endorsed by the national political branches. But what if the President's foreign policy decisions—which may contribute to the definition of international custom, or conceivably waive national rights to protest an emerging norm—are nevertheless not constitutionally sufficient to authorize its domestic incorporation?

I do not mean to suggest that revisionists are peculiarly responsible for addressing all this; that would be a cruel reward for raising such good questions in the first place. The point, instead, is that before we can resolve whether the context has changed, or whether other elements of the constitutional structure provide a sufficient alternative, it is necessary that we learn a lot about related doctrines.

A partial answer is to conduct scholarship of a still more synthetic nature. The American Law Institute's successive Restatements of Foreign Relations, and the first and second editions of Louis Henkin's *Foreign Affairs and the U.S. Constitution*, have substantially defined the orthodoxy by creating a comprehensive field of US foreign relations law. Though a compelling assortment of individual scholarly works suggest potential revisions to that orthodoxy, it is impossible to assess what they have achieved until a more integrated work allows us to see the effects of simultaneous changes in the constitutional landscape.

The real solution, though, will have to come from the courts, in particular the Supreme Court. One reason so few questions of foreign relations federalism get answered is because the Court has chastened itself to avoid constitutional grounds for decision, including by construing statutes to avoid them. This kind of minimalism is enjoying quite a broad-based revival,¹⁵ but its discretion-laden character leaves something to be desired,¹⁶ especially in this context. Avoiding constitutional questions may prevent any progress toward a comprehensive understanding of the constitutional scheme: even as premature constitutional renderings may fail to appreciate legal or factual circumstances that might later prove influential, the failure to establish foundational propositions in first generation cases may impoverish or distort the analysis in later, more marginal constitutional cases. Time also makes a difference in the real world. We may plausibly regard state-conducted foreign relations activities, for example, either as precedent-setting or as a deviance; as time passes, and acts are not censured, courts are more likely to regard them as formative. Finally, very few areas are genuinely *tabula rasa*, and avoidance doctrine blinks reality in supposing that there is a clearly delineated class of unresolved constitutional questions, and that lower

15. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum L Rev 1454 (2000).

16. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

courts may comfortably sidestep constitutional questions that appear to be settled. In *Gerling*, for instance, the Ninth Circuit plausibly regarded the Supreme Court's own reticence as indicating that *Zschernig* had withered on the vine. That may or may not be right, but it surely illustrates the difficulty of avoiding constitutional issues in a world where voids are less common than are rules of uncertain scope and vigor, and where a lower court may be forced to denigrate or distinguish ostensibly binding precedent before it can freely put constitutional issues to one side.

II. UNCERTAIN CONSTITUTIONAL VALUES

Most lawyers are trained to avoid value-laden arguments, and the monopoly orthodoxy was typical in making few overt claims about what mattered, or why. The trick was to assert that the Constitution dictated that states were to have nothing to do with foreign affairs and that international law was supreme federal law, and then to avoid saying much more. There was dissonance everywhere, of course, so one needed to keep repeating these refrains mantra-like—which may have something to do with the dicta cluttering the US Reports.

But if neither the original understanding, nor binding case law, warrants this kind of confidence, we have to ask why we should care about apparent losses in federal or state authority. Arguments for any transformative understanding of foreign relations federalism invite the same question: if we seek to ensure that some equilibrium is maintained by constitutional law, surely we must know what values lie in the balance, even before we try to figure out their relative weights or how to reconcile them.

The national value most often invoked is the need to maintain the supremacy of federal policy, but supremacy is not genuinely at issue. No one disputes that properly enacted treaties, statutes, and executive acts have preemptive authority; as long as someone makes clear what the law is, supremacy usually takes care of itself. What is really at stake is the ability of Congress and the President to pursue the national program without undue state interference, and this value—and the implicit compromise with state interests—requires some unpacking. The usual explanation for the federal privilege is that national power is required to resolve collective action problems. Foreign policy often looks like a public good, in that while states benefit from a harmonized negotiating position, the appeal of defection (since it may be more profitable to deviate while others cooperate) may disable cooperation. Positive and negative externalities are also commonly asserted. State initiatives to protect human rights in places like South Africa and Burma are striking in part because they seem unlikely; we would predict that states generally underprovide such activities because the benefits largely redound to others. Negative externalities are more obvious. If one state's activities raise hackles in a foreign country, that country may retaliate in a way that affects other states.

But none of this is terribly instructive. For one thing, identifying true collective action problems—and determining when Tiebout conditions favoring smaller solutions are absent¹⁷—may be quite difficult, and it is even harder to generalize about their prevalence. For example, Peter Spiro has argued forcefully that globalization makes states increasingly vulnerable to targeted retaliation, thus reducing the potential for negative externalities.¹⁸ I happen to doubt that this could undermine any case for exclusive federal authority: foreign countries still have the option of choosing to target the US as a whole (which, given the national government's presumed authority to resolve the matter by preemption, they would be foolish to forswear), and even the most exquisitely targeted retaliation has spillover effects. To take a contemporary example, if a foreign country retaliated against California by refusing to supply fuel to its power plants, other states just might feel the impact. But we do not know, generally, when spillovers are likely to occur, or when a spillover should be regarded as an acceptable byproduct of an integrated national economy.

Externalities do not, in any case, explain why *exclusive* national authority is necessary, since the power to act preemptively would ordinarily suffice. And even if we were to suppose that exclusivity is valuable for some reason, we have to wonder whether it is a pipe dream. Take, for example, the World Trade Organization ("WTO") Agreement on Government Procurement. States wanted to open up purchasing by all levels of foreign governments, but optimally without compromising their own discretion; in the end, the US wound up permitting substantial variation among state commitments, even excluding more than a dozen states from any obligation.¹⁹ Though such variation might have been in the national interest, it equally illustrates the limited potential for capitalizing on any monopoly within a political process permeable to the states.

The arguments in favor of state interests have their own difficulties, though their claims are usually modest. The stereotypical assertion of states' rights—arguably, the kind of claim essential to arguing that foreign relations are federal in any strong sense—would be that certain state interests are inviolable. But the availability of plenary national foreign affairs authority substantially rebuts any such claim, since (so far as we know) it may be exercised without regard to limits on domestic authority.

17. For a general discussion, see Robert P. Inman and Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 *Tex L Rev* 1203, 1217–29 (1997).

18. See, for example, Peter J. Spiro, *Foreign Relations Federalism*, 70 *U Colo L Rev* 1223, 1226 (1999) (concluding that, in light of new participation by states in global affairs, "there is no justification for the courts to enforce a default rule protecting federal exclusivity in the face of contrary state-level preferences").

19. Agreement on Government Procurement, art 5, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), (Apr 15, 1994) available online at <http://www.wto.org/english/docs_e/legal_e/gpr-94.pdf> (visited Sept 30, 2001).

The Constitution scarcely goes out the window, and we may assume, for example, that the US could not sign a treaty with Switzerland by which the two agreed to divest themselves of all states and cantons.²⁰ States may also be immune from foreign-relations commandeering and certain kinds of remedies for treaty violations. But the unsettled and marginal nature of these safeguards discourages stronger claims of dual international sovereignty.

A more typical argument for state's rights invokes the principle of nondiscrimination. As a defense to dormant Foreign Commerce Clause objections, for example, states routinely claim that they should be treated as would any other "market participant," and that such a defense applies equally to *Zschernig*-type objections.²¹ Others argue that states are merely some of the many actors potentially disrupting the national government's "one voice" in foreign affairs; even if maintaining that voice is still feasible, it is unfair to single out the states for silencing. The Supreme Court has, unsurprisingly, never resolved these questions,²² perhaps because their implications may be far reaching. While it is theoretically possible to treat states as favorably as private actors for some purposes, and more favorably in other contexts, dissonance sets in at some point: if states really do not differ from businesses or consumers for purposes of dormant foreign relations preemption, it seems all the more problematic to argue that they deserve special dispensation with respect to national legislation or treaties. The implications of the comparison are also unpredictable. *Zschernig*, for example, alluded favorably to an article arguing that private corporations, too, should be excluded from interfering with national diplomacy.²³

Revisionists similarly protest that federalism should be taken no less seriously in the foreign relations context. If, for example, the Tenth Amendment limits Congress's authority to legislate with respect to interstate commerce, it should equally

20. *De Geoffrey v Riggs*, 133 US 258, 267 (1890) ("It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.").

21. See, for example, Brief for Petitioners at 27–29, 37–38, *Crosby v National Foreign Trade Council*, 530 US 363 (2000). Compare *National Foreign Trade Council v Natsios*, 181 F3d 38, 60 (1st Cir 1999) (rejecting such an exception), *affd* on other grounds, *Crosby v National Foreign Trade Council*, 530 US 363 (2000), with *Trojan Techs, Inc v Pennsylvania*, 742 F Supp 900, 903 (MD Pa 1990) (describing the incidental effect of a "Buy American" law as owing to state "participation in the market place and not to any effort to control or regulate commerce with foreign countries").

22. See *Reeves, Inc v Stake*, 447 US 429, 437 n 9 (1980) (noting that "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause," but cautioning that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged").

23. See Arthur S. Miller, *The Corporation as a Private Government in the World Community*, 46 Va L Rev 1539 (1960), cited in *Zschernig*, 389 US at 440–41.

limit the federal government's ability to accomplish similar ends by treaty.²⁴ This has the virtue of pitching the relative privileging of federal authority, and the diminished concern for state authority, as foreign relations "exceptionalism," placing the burden on those arguing for difference rather than making any argument from first principles. Yet it seems an unlikely place to start. The reason to value federal states, as opposed to any other kind of decentralized governance, has everything to do with territory—their claim to local political legitimacy.²⁵ But contemporary desire to reside in Maryland, rather than Virginia, probably has little to do with either's approach to foreign relations, and the choice of Maryland over California probably has even less. To the contrary, the need to conduct foreign relations effectively has long been understood as the central basis for the creation of *national* political legitimacy, and there has been surprisingly little change. Among recent controversies, *Breard* involved Virginia's *failure* to conduct foreign relations, and even defenders of Massachusetts's Burma legislation were torn between evoking the Boston Tea Party and relying instead on the right not to do business with certain foreigners,²⁶ or on the immunity bestowed by the national legislation implementing the Uruguay Round.²⁷

The likely retort would be that globalization makes distinguishing locally based legitimacy increasingly untenable. State prosecutions may involve foreign defendants; state purchases may involve foreign purchases; state exports are as likely to cross the oceans as to cross state lines. Globalization's transformative effect is probably overstated, but if this line-blurring argument is valid, it strikes a serious blow at the premises for respecting territorial legitimacy in the first place. If state policies become proportionately more occupied with external relations, the diversity of their local determinants dwindles; it is not as though Maryland and Virginia interact with different Burmas, and it is difficult to imagine too many cases in which the distinctive qualities of a state relate to a foreign matter. Other state values, such as public participation and experimentation, may often be achieved by other kinds of decentralization, and are not in any real sense evidenced by recent episodes. A case

24. See Bradley, 97 Mich L Rev at 394–95 (cited in note 12).

25. See Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 Ga St U L Rev 1009, 1013, 1033–34 (1997); Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903 (1994); see also Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 Vand L Rev 1303, 1337–38, 1344–49 (1994) (stressing territorial integrity as a feature distinguishing federalism from localism). For a critical response to Professors Rubin and Feeley, see Barry Friedman, *Valuing Federalism*, 82 Minn L Rev 317 (1997).

26. Such a right would obviously be problematic in the domestic context, where the claim to state sovereignty is surely stronger. For example, there can be little doubt that Massachusetts would be unable to refrain from doing business with companies doing business in Virginia, regardless of its feelings concerning *Breard*. For an extended argument to this effect, see Alisa B. Klein and Mark B. Stern, *Back to First Principles: The Constitutional Rationale for Invalidating Local Sanctions Against Foreign Trade*, 33 L & Pol in Intl Bus (forthcoming 2001).

27. See *Crosby*, 530 US at 386 n 24.

can be made for state interests, to be sure, but as with national interests, we have little basis for suspecting their ubiquity in foreign relations matters.

III. UNCERTAIN INJURY

So law does not permit us to avoid value-laden questions in reconsidering foreign relations federalism, and the values to which we are committed in that sphere are also unclear. This alone makes it difficult for us to imagine rationally resolving apparent conflicts between federal and state interests. But there is another mystery requiring attention: even if we knew what kinds of values we were trying to reconcile, how can we detect their presence? Imagine, perhaps, that an intrepid underwater explorer like Cousteau, lacking clear instructions from the mainland, has to decide whether to preserve a fantastic bed of rare coral or salvage the sunken treasure chest enmeshed in it. Reconciling those two imperatives when they genuinely conflict is a serious problem, one I want to touch on in the final section. But what if the explorer has difficulty saying for certain what the objects are (whether it's really rare coral, or a treasure chest), and whether either is at risk?

The example is far-fetched, but the problem is real: how do we determine when federal or state values are being meaningfully compromised? Answering seemingly requires us to develop a means of detecting injury, and inevitably some kind of threshold as well, tasks at which the monopoly orthodoxy failed nearly completely. Courts were supposed to use their ordinary procedures for discerning harm, and did little to encourage government officials in believing that their views would be taken into account—perhaps because of the awkwardness that would ensue when those submissions were not followed. The threshold for concern, according to *Zschernig*, was whether the state's law has "more than some incidental or indirect effect in foreign countries,"²⁸ a standard that seemed tailor-made to strain the foreign policy expertise of courts. For purposes of the dormant Foreign Commerce Clause, courts were to distinguish between matters "merely ha[ving] foreign resonances" from those "implicat[ing] foreign affairs,"²⁹ an inquiry posing less of a forensic challenge only because it was more vague. Courts did not even ask about injury to state values, save implicitly through the lack of concern over trivial infringements of the national interest.

Revisionists, on the other hand, generally prefer an integrated approach to detecting and addressing injury, one perceiving positive political authority as a self-contained system. One might imagine, for example, that national values are infringed when the national government's state of repose is disturbed, and Congress is forced to legislate when it otherwise would not; the revisionists stress, though, Congress would

28. See *Zschernig*, 389 US at 434.

29. *Container Corp of America v Franchise Tax Bd*, 463 US 159, 194 (1983).

then have solved the problem itself through preemption. If Congress instead chooses *not* to act, and suffers state activities in silence, that in itself may be meaningful, at least where Congress has “focused its attention” on the issue (as in *Barclays*) or legislated without speaking directly to an evident issue (as in *Gerling*), since Congress may cede its foreign relations authority without explicitly permitting the states to act.

This leaves the question of what to do when the indicia of congressional will are less direct—for example, when state foreign affairs activities do not manifestly conflict with any preexisting legislative scheme, and Congress has not in any meaningful sense acquiesced. One way of coping is through presumptions, either one generally disfavoring preemption or the more particular one favoring foreign affairs preemption. The fact that either might be invoked in foreign affairs cases is itself troubling. The Court in *Crosby* opted for neither, but could not help suggesting that it might behave differently on some future occasion, and so managed to maximize confusion.³⁰

Jack Goldsmith has decried this uncertainty, and concluded that there is no convincing constitutional or normative warrant for either presumption.³¹ By his lights, because we cannot really distinguish truly unprotected interests (a national interest Congress inadvertently surrenders, or a state interest Congress inadvertently trammels) from interests that have simply been put through the political wringer, we should refrain from creating rules that try to nudge Congress one way or the other. Instead, courts should just read foreign relations statutes as written, and let that be the guide to where the national interest lies—and, at least by omission, where the state’s interests lie.

There is much to commend this approach, but it throws in the towel a little too quickly. To be sure, state interests are sometimes compatible with national interests, and it does seem inappropriate to portray congressional protection of state interests in human rights treaties and in trade agreements as intrinsically pathological. Not only does that suppose that such concessions have been extracted from an unwilling Congress,³² but overlooks that they result from a democratic process to which states naturally contribute—and, indeed, do so as the principal means of safeguarding their Tenth Amendment interests.

30. The Court did not directly speak to the issue of any presumption favoring foreign relations preemption, though some of the opinion’s reasoning—and its rather strong result—may be regarded as supporting such a conclusion. It specifically postponed “for another day a consideration in this context of a presumption against preemption,” thereby suggesting that the presumption might apply on a context-by-context basis. *Crosby*, 530 US at 374 n 8. This suggestion was echoed by its decision in *United States v. Locke*, 529 US 89, 108 (1999), which dismissed any “beginning assumption” that state regulation was valid in the context of national and international maritime commerce.

31. See Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S Ct Rev 175, 195–201.

32. See Curtis Bradley, *A New American Foreign Affairs Law?*, 70 Colo L Rev 1089, 1096–97 (1999).

Nonetheless, state measures will very often conflict with the national interest, and Professor Goldsmith's examples of federal-state synergies do not really suggest otherwise. Even if states can help put "underscrutinized" foreign activities on the federal agenda (perhaps in tension with his supposition that an omniscient and alert Congress is in no danger of overlooking state legislation or permitting it to persist simply by virtue of inertia), passing state laws is an unnecessarily coercive means of providing notice. Likewise, while one may suppose that the federal government lacks the "capacity" to address local constituencies with equal zeal, its failure to do so more certainly bespeaks a lack of interest or even active disinclination; even where state activities (like sanctions) might give the national government leverage, we might fairly assume that strategies uniquely adopted by states were declined for good and proper reasons. Identifying unprotected interests and reconciling them is difficult, but we should not assume that some natural harmony allows us to forego the exercise.

In any case, junking statutory presumptions leaves the business of identifying national and state interests as murky as ever. First, ascertaining how federal legislation reconciles national and state interests is not substantially easier than generalizing in the form of presumptions. Even if "the most accurate measure of the [national] interest is the democratic political process,"³³ the resulting statutes are often opaque, and courts are forced to construe them. Just as state sanctions laws may (or may not) provide leverage that is compatible with the national interest, those same laws may (or may not) promote the objectives of particular federal statutes, and it will often be difficult to evaluate such contentions based on the statutory text alone. In *Crosby*, for example, the Court found it strangely easy to conclude that additional state sanctions were more overkill than constructive leverage; in contrast, the *Gerling* court of appeals seemed to regard the similarity of federal and state objectives as a clear signal that they could be reconciled.³⁴ Neither conclusion was well supported.

Second, bypassing statutory presumptions simply highlights other constitutional conundrums. Even shorn of its presumptions, preemption doctrine reflects debatable constitutional premises, like the assumption—blithely accepted in *Crosby*—that state laws interfering with the "objectives" of national legislation (but not its terms) are preempted. That assumption is just as surely tainted by a sense of the proper roles for the federal government and the states.³⁵ Moreover, regarding Congress as a sufficient arbiter of national and state interests assumes that it is the repository of federal foreign relations authority, when we know that the President also plays a role. The

33. Goldsmith, 2000 S Ct Rev at 193 (cited in note 31).

34. Compare *Crosby*, 530 US at 379–80 (rejecting argument that sharing the same goal redeemed a state statute employing different means), with *Gerling Global Reins Corp.*, 240 F3d at 750 (observing that "the Holocaust Act, HVIRA, and the executive branch initiatives share the same policy objective, though they seek to achieve that policy objective by varying techniques").

35. See Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000) (arguing that "obstacle" preemption, along with the presumption against preemption, should be discarded).

absence of any preemptive presidential policy may, of course, merely signal that the President has declined to exercise authority, which would put the burden on those seeking to explain why the courts should exercise it in his stead. But the most salient presidential actions involve diplomacy that is often confidential, highly unstable, and rarely expressed in any obviously preemptive fashion. Considering the President's treaty power provides a solid constitutional basis both for national exclusivity and for excusing otherwise questionable state conduct.³⁶ It also warrants presuming foreign relations preemption: even if Congress's vision of the national interest is susceptible to concrete expression, and should be encouraged to take statutory form, the President might be presumed to have a policy with respect to every foreign government.

Third, as much as judicially-engineered statutory presumptions may diverge from congressional intent, we are equally handicapped in understanding Congress and the President by what the courts are *not* doing—that is, clarifying the background constitutional norms. A member of Congress, trying to decide whether to favor preempting a state sanctions measure, might have the happy thought that by saying nothing, Congress can avoid the political cost of preemption and perhaps achieve the same end through the judiciary—and given the lack of clarity in the law, later claim to be surprised when the activity is deemed constitutional or unconstitutional (or, depending on which way the wind is blowing, *unsurprised*). This may be ideal for politicians more concerned with credit claiming (and blame avoiding) than with policy certainty, but it is dysfunctional in its public character. *Crosby* recognized that Congress legislates with an occasional eye toward legal doctrine, but Justice Souter must have been writing ironically in opining that congressional inaction “may reflect nothing more than the *settled* character of implied preemption doctrine that courts will *dependably* apply.”³⁷

It may seem equally ironic to dwell on the federal government's inability to identify injuries to the national interest, since its attention to state interests is the more imperfect. The concession to states in the Uruguay Round Agreements Act, or through the reservations, understandings, and declarations (“RUDs”) sometimes attached to treaties, may materially understate political solicitude for state interests were their constitutional constraints completely apparent. States may also be unduly deferential in asserting their interests. Just as Congress acts against an uncertain constitutional background, states may be deterred from acting by the vestiges of the monopoly orthodoxy, and falsely so if that doctrine would no longer command a majority of the Court. The oft-observed explosion of state activities touching on foreign relations may be nothing compared to what would transpire if everyone

36. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 *Duke L J* 1127 (2000).

37. *Crosby*, 530 US at 387–88 (emphases added).

understood that the only limits were imposed by actual federal enactments—a point that neither Congress, nor the Supreme Court, seem inclined to clarify anytime soon.

IV. UNCERTAIN SOLUTIONS

Even if we are unsatisfied with the present capacity of the national political process to detect and resolve injuries to federal and state values, we may be starved for alternatives. Injuries to federal and state values, assuming we can detect them, are largely incommensurable, and resist balancing. To the extent each represent a genuine legal or political commitment, any clash between them in a given case appears to require that one or the other be renounced before a decision can be made—a compromise in the worst sense of the word.³⁸ Judicial balancing raises special difficulties. Balancing is attractive insofar as it encourages the fullest articulation and evidencing of competing interests. But its critics are rightly concerned that the judiciary lacks the institutional expertise to reconcile even the best-documented claims. Until the relevant law is better ironed out, too, courts will be balancing interests that are not yet defined or prioritized, which can hardly improve the exercise's credibility.

The challenge, then, is to administer foreign relations federalism in a way that improves our understanding of the relevant conflicts before pretending to resolve them. At the risk of sounding simplistic, I think the appropriate model may be one of informed consent, and we might usefully sketch how a consent-oriented practice would address the uncertain variables of foreign relations federalism.

Although Congress seems the best forum for mediating national and state interests, it is chronically short of reliable information,³⁹ and prone to overlook the state and local experimentation that nominally marks the genius of federal systems. Prevailing case law also does a poor job of stimulating state information. *Barclays* suggested the advantage of notoriety: California could plausibly claim that because Congress purposefully refrained from preempting its method of taxation, dormant Foreign Commerce Clause objections were no longer as vital. But the Court also said that such passive approval would not be presumed when state activities were discriminatory;⁴⁰ in combination with *Crosby*, which deemed it relevant that Congress

38. For a technical explanation of why that need not always be so, see Isaac Levi, *Hard Choices: Decision Making Under Unresolved Conflict* (Cambridge 1986).

39. See generally Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago 1994).

40. *Barclays Bank PLC*, 512 US at 323 ("Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential'; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce," among other potential flaws). This is arguably an unwarranted import of an idea from the domestic setting into the foreign: discrimination among nations is often highly

had failed to adopt legislation that would have exempted Massachusetts-type activities,⁴¹ states might understandably regard stealth as the preferred course for activities that distinguish among foreign countries.

This state of affairs is plainly unfortunate, but scarcely inevitable. Congress should be given the opportunity to override state activities with which it would disagree; at the same time, if a fully informed Congress elects not to preempt the relevant activities, it seems inappropriate to presume that they are incompatible with the national interest. The challenge, obviously, is to encourage the states to bring potentially infringing activities to Congress's attention. Congress might, for example, require the states to provide notice of laws or other regulatory activities (as opposed to, say, individual contracts) affecting foreign relations, or suffer a statutorily imposed presumption that such activities are preempted by any subsequently enacted legislation. Though requiring state reports might be objected to as a violation of the anti-commandeering principle, it only results in a presumption,⁴² and at worst should fall within the recognized exception for conditional preemption.⁴³ Such a rule might also be redeemed as a prophylactic exercise of Congress's constitutional authority to consent to compacts between states and foreign powers. Although the consent requirement has been loosely read with respect to interstate compacts, case law treats compacts with foreign powers much more formally, and supports both a broad view of the compacts subject to constitutional constraint and a narrow reading of state authority preliminary to such compacts.⁴⁴ Irrespective of whether this entails the dormant preemption of state activities, Congress should be entitled to regulate proactively potentially infringing state activities.

The President's function, particularly in the judicial review of constitutional or statutory controversies, has been even more gravely impaired. Courts have found it difficult to steer between undue capitulation to executive branch views, on the one hand, and betraying the respect owed a coordinate branch, on the other, and so have failed to come up with any predictable approach. The underlying problem concerns the uncertain constitutional basis for presidential involvement. If presidential influence is derived from the Foreign Commerce Clause, for example, it may prove

productive, and does not present the same risk to solidarity as would discriminating against another state.

41. *Crosby*, 530 US at 376 n 11, 378 n 13, 385 n 23 (discussing legislative history).
42. Conversely, notice should not by itself resolve the preemption issue in a state's favor, lest federal legislative authority be reduced to a poor facsimile of the Virginia Plan rejected by the Constitutional Convention.
43. See *New York v United States*, 505 US 144, 174 (1992); see also Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U Colo L Rev 1317 (1999) (considering whether the anti-commandeering principle should be applied to the treaty power).
44. See, for example, *Holmes v Jennison*, 39 US 540, 569–76 (1840) (Taney); Swaine, *Negotiating Federalism*, 49 Duke L J at 1223–36 (cited in note 36).

difficult to resolve with congressional authority, particularly when Congress is perceived to have passively permitted state conduct.

The sounder basis for presidential participation, as I have argued elsewhere, lies in the Treaty Clause, which gives the President a coequal role in safeguarding and advancing American interests. Because the President's negotiating function cannot adequately be protected against encroachment by after-the-fact positive political enactments, it warrants the dormant preemption of state activities approximating the negotiation with foreign powers—but would not extend, for example, to state conduct concerning foreign private parties, or applying equally to foreign and domestic parties alike. More important for immediate purposes, when the President concurs with Congress's implied view that otherwise suspect state activities pose no cognizable risk to the national interest, his submission to that effect should be conclusive as to any claim that those activities interfere with national prerogatives derived from the treaty power. This authority may not be entirely welcome, but neither should it be shirked or delegated to the courts.

The national institutions can also help empower state consent. Congress and the Senate may find it appropriate to reinvigorate their function as the federal guardians of state interests, such as by (really) requiring presidential notification of important negotiations and providing for consultation with relevant congressional committees.⁴⁵ Circumstances may also commend the judicious use of RUDs to demarcate continuing state prerogatives, while resisting suggestions that the invalidation of any such reservations revives the unqualified terms of the treaty⁴⁶—a result inconsistent with any premise of national or state consent. Finally, Congress may also enhance legislative and state participation by requiring, at least to the extent consistent with the President's executive and "take care" authority, that the President consult the states and take their interests into account prior to litigating statutory claims, such as in the Uruguay Round Agreements Act.⁴⁷

45. See, for example, Swaine, 49 Duke L.J. at 1252 n.438 (discussing Circular 175 procedures).

46. See, for example, *Domingues v Nevada*, 961 P.2d 1279, 1281 (Nev. 1998) (Rose dissenting) (suggesting that "if the United States has shown an intent to accept the treaty [International Covenant on Civil and Political Rights] as a whole, the result could be that the United States is bound by all of the provisions of the treaty, notwithstanding the reservation"). For a rebuttal, see Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 436–39 (2000).

47. The Uruguay Act's legislatively-compelled Statement of Administrative Action should not be emulated, however, to the extent that it merely seeks to raise logistical barriers to harmonizing domestic and international legal obligations, nor to the extent that it bars the submission of probative evidence—in the form of panel or appellate body reports issued by the WTO—which may be relevant, if not dispositive, in the judicial evaluation of national injury. Compare Uruguay Round Agreements Act § 102(c)(1), Pub. L. No. 103-465, 108 Stat. 4809, 4817 (1994), codified at 19 USC § 3512(b)(2)(B)(i)(1994) with Statement of Administrative Action, reprinted in 1994 USCCAN 4040.

The ultimate challenge, I believe, is one that revisionism has not yet begun to consider: locating new functions and values for the states in a globalized, yet federal, world. Instead of defending ill-defined prerogatives, insisting that an immeasurable federal-state balance be maintained, or hoping that state interests are accorded appropriate respect in the national political process, it may be more constructive to consider how state consent to the underlying operation of international affairs might be perfected. Perhaps the possibility of congressionally licensed state compacts with foreign powers needs to be revived, or the ability to enable genuinely independent foreign relations by dissident states (while at the same time preventing them from free-riding on the collective bargaining strength of their peers). Perhaps states need to be recognized as not just the objects of customary international law, but also as its subjects, and acknowledged as potential contributors to its norms. Considering what little we really know about the undersea world of foreign relations federalism may embolden us to explore still more aggressively in waters that are completely uncharted.